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No. ~~861~~

Supreme Court of the United States

OCTOBER TERM, 1948.

NANCY BRADBURN, *nee* YARHOLA,
Petitioner,

VERSUS

SHELL OIL COMPANY, INCORPORATED,
Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE TENTH CIRCUIT AND SUPPORTING
BRIEF**

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June, 1949.

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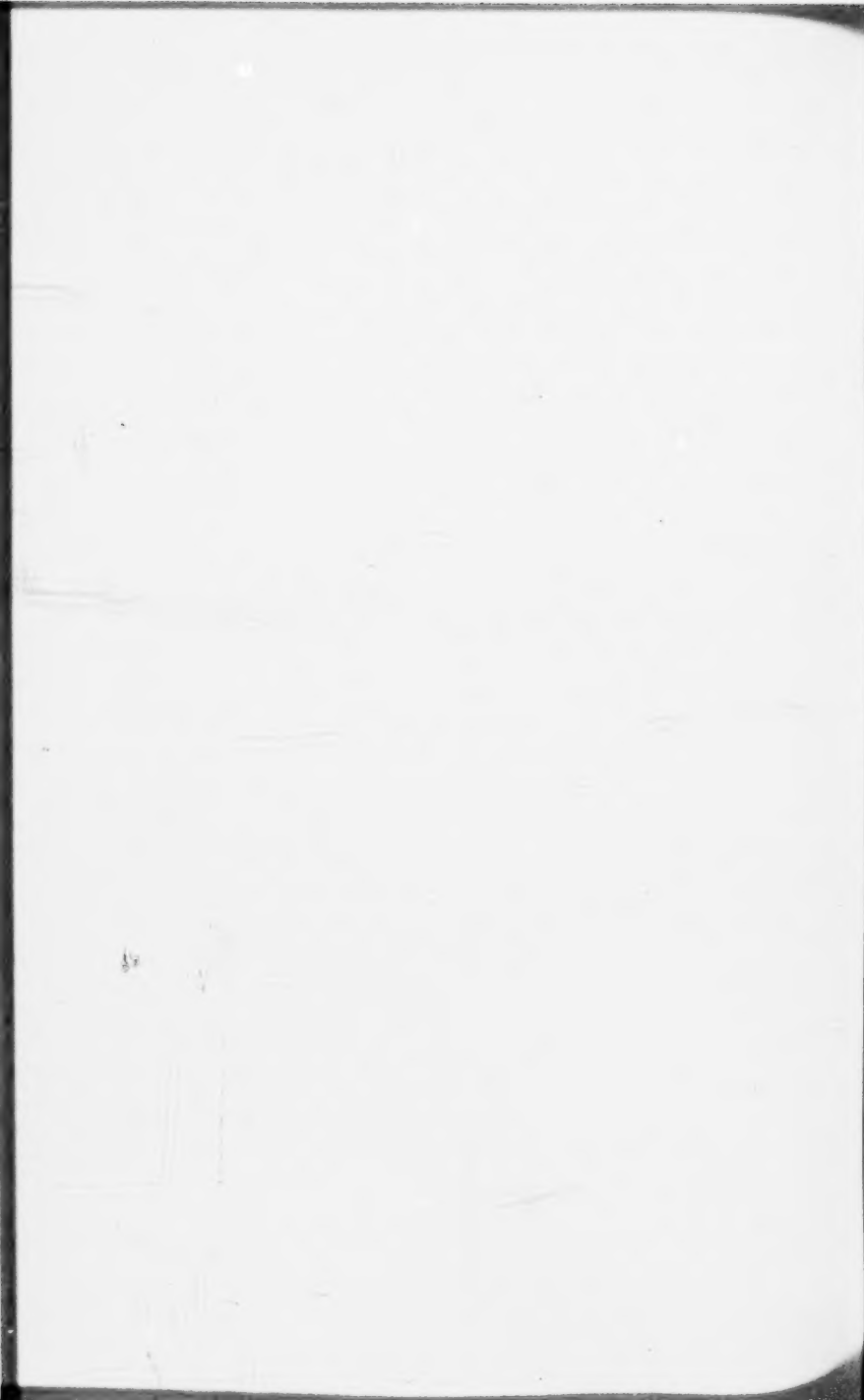
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V E R S U S

SHELL OIL COMPANY, INCORPORATED,
Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO THE
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FOR THE TENTH CIRCUIT AND SUPPORTING
BRIEF**

*To the Honorable, the Chief Justice and the Associate
Justices of the Supreme Court of the United States:*

SUMMARY STATEMENT OF MATTER INVOLVED

This petition challenges the correctness of the decision of the Circuit Court of Appeals, Tenth Circuit, relating to the effect of and validity of certain conveyances executed by a fullblood Creek Indian devisee member of the Five Civilized Tribes. Said conveyances were executed subsequent to the effective date of the Act of Congress, April 12, 1926 (44 Stat. 239). The conveyances were not approved by the County Court of Oklahoma having jurisdiction of the settlement of the estate of the deceased allottee or testator. Section 9 of the Act of Congress of May 27, 1908 (35 Stat. 312), as amended by Section 1 of the Act of Congress April 12, 1926 (44 Stat. 239).

The Circuit Court below in the judgment here questioned, held: ¹

1. That the Secretary's original approval of the oil and gas mining lease executed by the allottee in 1912, operated to remove the restrictions on the payment of the oil and gas royalties reserved in said lease to the allottee. Section 2 of the Act of Congress May 27, 1908 (35 Stat. 312), authorized the Secretary of the Interior to promulgate rules and regulations for the sale and approval of oil and gas mining leases on lands belonging to restricted members of the Five Civilized Tribes. The court below held that the Secretary's approval of the oil and gas lease was in effect a removal of restrictions and the land remained unrestricted unless restrictions were reimposed by the Secretary of the Interior. The court below further held that the amendment of April 12, 1926 (44 Stat. 239)

"did not have the effect of reimposing restrictions on receipt of royalties which had heretofore been restricted only by regulations of the Secretary of the Interior under the 1908 Act. We said that the 1926 Act² 'in no sense impinged on the right to receive payment of royalties under oil and gas leases, the restrictions upon which had been removed by the Secretary of the Interior and not reimposed by him before the effective date of the 1926 Act'."

This action was brought by Nancy Bradburn, formerly Yarhola, a fullblood Creek Indian, Roll No. 4973, daughter and devisee of Linda Yarhola, fullblood Creek

¹The opinion of the court below is printed in the record at page 461.

²Quoting from *Chisholm v. House*, 160 Fed. (2d) 632.

Roll No. 4971. Linda Yarhola was allotted certain lands in Creek County, Oklahoma, upon which an oil and gas mining lease was taken February 12, 1912, and approved by the Secretary of the Interior in conformance with Sections 1 and 2 of the Act of Congress May 27, 1908 (35 Stat. 239). By various assignments, all approved by the Secretary of the Interior, the lease was acquired by Shell Oil Company, Incorporated, respondent. The lands were developed for oil and gas and produced oil and gas in large quantities. All of the proceeds from the reserved one-eighth royalty were paid to the Superintendent for the Five Civilized Tribes, Muskogee, Oklahoma, for the use and benefit of the allottee; Linda Yarhola died testate February 5, 1917, a resident of Okmulgee County, Oklahoma, and among other provisions in her will, devised her allotted land one-fifth to Cussehta Yarhola, her husband, and two-fifths each to Nancy and another daughter, Lessey. The will was admitted to probate in the County Court of Okmulgee County, Oklahoma, and when said estate was closed proper orders of distribution were made and title to the two-fifths devised interest in said allotment vested in petitioner.

Several years prior to the date of the order of distribution, petitioner had been declared incompetent by the County Court of Okfuskee County, Oklahoma, and a legal guardian had been appointed for her, and upon receipt of her two-fifths interest in said allotment, and upon execution of proper division orders and transfer orders by her guardian, the income from her devised interest in said allotment was paid to said guardian. In June, 1924, petitioner was restored to competency by an order and judgment of the County Court of Okfuskee County, Oklahoma,

and on the date of her restoration to competency petitioner executed an express trust vesting title in all of her property, including her devised two-fifths interest in said allotment, in the trustees.

The original trust agreement was for a term of seven years. In 1925, the term was extended to twenty-one years. On December 19, 1929, one of the trustees resigned and a conveyance was executed by petitioner and her trustees vesting title in all of her estate in the new trustees. Upon execution of division orders and transfer orders furnished by the respondent, the income from the two-fifths of the one-eighth reserved royalty in said allotment was paid by the respondent to the new trustees.

In December, 1937, the trustees terminated the trust by quit-claiming back to Nancy, whereupon she conveyed said property in trust to Roy Bradburn for a term of ten years. Upon execution of division orders and transfer orders the respondent paid to the new trustee the income from the two-fifths of the one-eighth royalty owned by petitioner. Petitioner's two-fifths of the Linda Yarhola allotment constituted part of the property conveyed in each of the foregoing deeds, none of which were approved by any County Court.

Petitioner sought to recover from Shell Oil Company, Incorporated, respondent, for all royalties paid to trustees subsequent to the execution of the conveyance and division orders to the new trustees in 1929, and the trustee named in the 1937 trust conveyance, on the theory that the Act of April 12, 1926, reimposed restrictions on petitioner's devised two-fifths interest in said allotment and all royalty

income therefrom; that in the absence of approval of said conveyances by the County Court in Oklahoma having jurisdiction of the settlement of the estate of the allottee or testator, said conveyances were void.

This action was commenced by Nancy Bradburn by filing a petition in the State District Court of Tulsa County, Oklahoma. The Government intervened after said cause was removed from the State Court. Trial was had in the United States District Court and at the conclusion of the evidence the trial court rendered judgment for the defendant. Thereafter the Government appealed and then dismissed its appeal; the plaintiff continued her appeal to conclusion in the Circuit Court.

STATEMENT DISCLOSING BASIS OF JURISDICTION TO REVIEW

A. Statutory Provisions Sustaining Jurisdiction.

The statute under which relief is sought in this Court is Section 240 of the Judicial Code, as amended, 43 Stat. 938, 28 U. S. C., Sec. 347.

The trial court's jurisdiction existed upon the following basis: petitioner, a fullblood enrolled Creek Indian, devisee of Linda Yarhola, an enrolled fullblood Creek Indian, commenced this action by filing a petition in the State District Court of Tulsa County, Oklahoma, seeking to recover from respondent certain restricted funds, proceeds of allotted lands (R. 1-15). Notice of the pendency of the action was served on the Superintendent for the Five Civilized Tribes (R. 45) pursuant to the provisions

of Section 3, Act of April 12, 1926, 44 Stat. 239, and the defendant petitioned for removal to the United States District Court for the Northern District of Oklahoma (R. 46) under Title 28 USCA, Sec. 71, and removal was effected (R. 47), and thereafter the Government intervened. Jurisdiction of the trial court rested upon Section 3 of the Act of April 12, 1926, and Title 28, USCA, Sec. 71. Judgment in the trial court was rendered for defendant and against plaintiff and intervener April 26, 1948. Notice of appeal was filed May 22, 1948 (R. 129).

Jurisdiction of the Circuit Court below rested upon Section 128 of the Judicial Code, as amended, 43 Stat. 936 (23 USCA, 225a).

B. Statutes of the United States, Validity of Which Is Involved.

The statute involved here is: Section 1, Act of April 12, 1926 (44 Stat. 239):

"That Section 9 of the Act of May 27, 1908 (Thirty-fifth Statutes at Large, Page 312), entitled 'An Act for the removal of restrictions on part of the lands of allottees of the Five Civilized Tribes, and for other purposes,' be, and the same is hereby, amended to read as follows:

"'Sec. 9. The death of any allottee of the Five Civilized Tribes shall operate to remove all restrictions upon the alienation of said allottee's land: Provided, That hereafter no conveyance by any full-blood Indian of the Five Civilized Tribes of any interest in lands restricted by Section 1 of this Act acquired by inheritance or devise from an allottee of such lands

shall be valid unless approved by the county court having jurisdiction of the settlement of the estate of the deceased allottee or testator'."

C. Date of Judgment and Date of Appeal.

The judgment sought to be reviewed here was rendered March 29, 1949 (R. 461). This petition for writ of certiorari was filed ———, 1949.

Since this case raises the question of whether or not the Act of Congress April 12, 1926 (44 Stat. 239), reimposed qualified restrictions on oil and gas royalties from restricted land acquired by devise by a fullblood Creek Indian member of the Five Civilized Tribes to the same extent as upon the land itself and whether or not Section 2 of the Act of May 27, 1908 (35 Stat. 312) authorized the Secretary of the Interior to impose restrictions upon royalties on lands where said restrictions had been terminated by operation of law, and since the Court below has held that the transferring or conveying of the devised interest owned by petitioner, a fullblood Creek Indian, without the approval of the County Court having jurisdiction of the settlement of the estate of the deceased allottee or testator was valid, then this Court should grant certiorari and review this decision.

It is conceded that at the time of the execution of the trust conveyances prior to April 12, 1926, petitioner's devised two-fifths interest in the allotment of Linda Yarhola was not restricted against alienation by any Act of Congress. Subsequently, however, by the Act of April 12, 1926 (44 Stat. 329), Congress imposed restrictions on petitioner's interest in the Linda Yarhola allotment by providing

“that hereafter no conveyance by any full-blood Indian of the Five Civilized Tribes of any interest in lands restricted by Section 1 of this Act acquired by inheritance or devise from an allottee of such lands shall be valid unless approved by the County Court having jurisdiction of the settlement of the estate of the deceased allottee or testator * * * .”

This section is but one of a series of statutes by which Congress has afforded the implements for enforcing its historic policy toward Indians to “protect them against the greed of others and their own improvidence” (*Sunderland v. United States*, 266 U. S. 226, 233, 45 Sup. Ct. 64, 69 L. Ed. 259). This policy was referred to in *Brader v. James*, 246 U. S. 88, 96, 38 Sup. Ct. 285, 62 L. Ed. 88, as discharging “the nation’s duty of guardianship over the Indians.” Recognition of such policy appears in all of the cases cited hereinafter.

Prior to the 1926 Amendment fullblood heirs, but not devisees, were restricted; the manifest purpose of the amendment “was to place restrictions upon conveyances by full-blood Indian devisees” and thus afford the same protection to fullblood devisees as had been given fullblood heirs prior to the amendment. *Grisso v. United States* (C. C. A. 10th, 1943), 138 Fed. (2d) 996, 1000, and in *Stewart v. Keyes*, 295 U. S. 403, 79 L. Ed. 1507, Syllabus 3, this Court said:

“The provisions of the Act of May 27, 1908, chapter 199, § 9, 35 Stat. at L. 312, relating to alienability of lands inherited upon the death of an Indian allottee, are, in view of the general purpose of the act, applicable as well to lands inherited before as after its enactment.”

By the ruling of the Circuit Court below, the Act of Congress April 12, 1926, was ineffective to reimpose restrictions against alienation of oil and gas royalties where oil and gas mining leases had been approved by the Secretary of the Interior. The Circuit Court in its opinion has confused the meaning of the provisions of Sections 1 and 2 of the Act of May 27, 1908, *supra*, and Section 9 of said Act as amended by the Act of Congress April 12, 1926. Section 1 of the Act of 1908 applied to conveyances executed by allottees of allotted lands. Section 9, as amended, applied to conveyances of lands by fullblood heirs "acquired by inheritance or devise from an allottee of such lands."

QUESTIONS PRESENTED

First: The qualified restrictions of the Act of April 12, 1926, Section 1, attach upon payment of oil royalties from restricted land to the same extent as upon the land itself, and any conveyance executed by a fullblood heir or devisee is void unless approved by the County Court having jurisdiction of the settlement of the estate of the allottee or testator.

Second: An oil and gas mining lease or conveyance executed by a fullblood restricted allottee member of the Five Civilized Tribes approved by the Secretary of the Interior in conformance with rules and regulations authorized by Section 2 of the Act of Congress May 27, 1908, did not operate to remove the restrictions on the payment of royalties accumulating from said allotment.

Third: The restrictions on the allotment of Linda Yarhola was not imposed by the Secretary of the

Interior. Neither did the Secretary of the Interior remove the restrictions; the restrictions expired by operation of law. The only power having the right to reimpose restrictions was the Congress of the United States. *Taylor v. Tayrien* (C. C. A. 10th, 1921), 51 Fed. (2d) 884, 887, *McCurdy v. United States*, 246 U. S. 263, 38 Sup. Ct. 289, 62 L. Ed. 706.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

In deciding that the Act of Congress of April 12, 1926, did not have the effect of reimposing restrictions upon oil royalties which had previously been removed by operation of law and further holding that the Secretary of the Interior, under the Act of Congress May 27, 1908, was the only agency having the right to reimpose restrictions, the Court rendered a decision probably in conflict with applicable decisions of this Court in *United States v. Noble*, 237 U. S. 74, 80, 35 Sup. Ct. 532, 59 L. Ed. 844, and in *Parker v. Richard*, 250 U. S. 235, 238, 30 Sup. Ct. 442, 63 L. Ed. 954, and *Brader v. James*, 246 U. S. 88, 62 L. Ed. 591.

Rendered a decision squarely in conflict with the prior decision of the Tenth Circuit Court of Appeals, *Holmes v. United States* (C. C. A. 10th, 1931), 53 Fed. (2d) 960, 963, rendered a decision probably in conflict with a decision of the United States Circuit Court of Appeals, Eighth Circuit, *Brown v. United States* (C. C. A. 8th, 1928), 27 Fed. (2d) 274, 277; and other decisions of the Tenth Circuit Court of Appeals, *Grisso v. United States* (C. C. A. 10th, 1943, 138 Fed. (2d) 996, 1000; *Tiger v. Sellers* (C. C. A. 10th, 1944), 145 Fed. (2d) 920, 923; *United States ex rel. Warren*

v. *Ickes* (App. D. C. 1934), 73 Fed. (2d) 844; *United States v. Gypsy Oil Co.* (C. C. A. 8th, 1925), 10 Fed. (2d) 487, 492.

The decision of the court below is a reversal of the former decisions and construction by the court of Acts of Congress enacted for the protection of the members of the Five Civilized Tribes, and is an attempt to distinguish or apply the Acts of Congress to mineral interest separate from the land. It is a further attempt to vest in the Secretary of the Interior a power never authorized or anticipated by Congress and to create a new policy with reference to officials or agencies designated by Congress to impose and remove restrictions on allotted and inherited lands.

Accompanying this petition is a certified transcript of the record in this case including the proceeding in the United States Circuit Court of Appeals for the Tenth Circuit.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari issue out of this Honorable Court directed to the United States Circuit Court of Appeals for the Tenth Circuit commanding the Court to certify and send to this Court for its review and determination on a day certain, a transcript of the records and proceedings herein; and that the judgment of the court below be reversed by this Court; and that your petitioner have such further relief as to this Court may seem just.

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B. E. HARKEY,
810 Braniff Building,
Oklahoma City, Oklahoma,

Counsel for Petitioner.

**BRIEF IN SUPPORT OF PETITION FOR
WRIT OF CERTIORARI**

STATEMENT OF FACTS

Nancy Bradburn, *nee* Yarhola, is an enrolled full-blood Creek Indian, daughter of Cussehta and Linda Yarhola, both also fullblood Creek Indians. Linda was allotted certain lands in Creek County, Oklahoma, upon which an oil and gas lease was taken February 12, 1912, and approved by the Secretary of the Interior. By various assignments all approved by the Secretary of the Interior, the lease was acquired by Shell Oil Company, Incorporated, respondent.

Linda Yarhola died testate February 5, 1917, and among other provisions in her Will, devised her allotted land one-fifth to her husband, Cussehta, and two-fifths each to Nancy and another daughter, Lessey.

The Will of Linda Yarhola was admitted to probate by the County Court of Okmulgee County, Oklahoma, and in due time an order of distribution was made distributing and vesting title in two-fifths interest of the 160-acre allotment of which Linda Yarhola died seized in petitioner.

Petitioner was a resident of Okfuskee County, Oklahoma, and during her minority and for some time after she reached her majority, she was represented by a guardian legally appointed by the probate court of Okfuskee County, Oklahoma; in June, 1924, the County Court of Okfuskee County, Oklahoma, entered an order restoring her to competency and discharging her guardian. June 14, 1924, she conveyed all of her property in trust to Washing-

ton Grayson and Hill Moore, trustees, for a period of seven years. The trustees had broad powers to invest, re-invest, collect, manage, sell, and otherwise deal with the estate and its proceeds, paying Nancy a stated \$500.00 per month. At the end of the term they were to reconvey said estate to Nancy. The trust agreement was modified at various times and in September, 1925, the term of the trust was extended to twenty-one years.

On December 19, 1929, one of the trustees resigned and Nancy, joined by the remaining trustee, conveyed all of said estate to the new trustees.

In December, 1937, the trustees terminated the trust by quitclaiming back to Nancy, whereupon she conveyed the estate in trust to Roy Bradburn for a period of ten years, said conveyance being dated December 17, 1937.

The two-fifths devised interest of the Linda Yarhola allotment belonging to petitioner constituted part of the property conveyed in each of the foregoing trust deeds, none of which were approved by any county court.

Subsequent to the settlement of the estate of Linda Yarhola, the Superintendent for the Five Civilized Tribes on April 2, 1921, advised the respondent that, owing to a recent United States Supreme Court decision, the Department was relinquishing supervision over the Linda Yarhola allotment. The respondent thereafter paid for Nancy's two-fifths of the one-eighth royalty of such oil runs by remittance directly to her various trustees, changes in such trustees being reflected in various transfer orders executed by petitioner as the various trusts were made.

Between the years 1924 and 1939 large sums in royalties were paid Nancy's various trustees for her devised two-fifths interest in the Linda Yarhola allotment. Plaintiff below sought to recover from respondent for these royalties paid the trustees subsequent to December 19, 1929, on the theory that the Act of April 12, 1926, reimposed restrictions on said devised two-fifths interest and that the conveyances, division orders and transfer orders executed by petitioner subsequent to December 19, 1929, were void in the absence of County Court approval; that the royalty payments to such trustees under such circumstances were wholly ineffectual.

The trial court rendered judgment for respondent, Shell Oil Company, Incorporated, upon three grounds; the only matter considered by the Circuit Court of Appeals and pertinent to this application for certiorari is found in the second finding of the trial court, wherein it was held that the Act of Congress of April 12, 1926, did not restrict royalty payments to the trustees on this lease or restrict petitioner's right to designate, by assignments or conveyances, other persons to receive such royalties.

Upon these facts the Court below held that:

"The 1926 Act did not have the effect of reimposing restrictions upon the receipt of oil royalties which had heretofore been restricted only by regulations of the Secretary of the Interior under the 1908 Act. We said that the 1926 Act 'in no sense impinged on the right to receive payment of royalties under oil and gas leases', the restrictions upon which had been removed by the Secretary of the Interior and not reimposed by him before the effective date of the 1926 Act."

The opinion of the Circuit Court of Appeals appears at pages 461 to 466 of the transcript.

ARGUMENT AND AUTHORITIES

The Question to Be Considered Is the Construction of the Act of Congress, April 12, 1926 (44 Stat. 239)

Because of the strained construction placed upon the various Acts of Congress by the Circuit Court of Appeals, we think it would materially aid the Court to briefly refer to the various Acts of Congress relating to the Five Civilized Tribes as regards restrictions on alienation or encumbrance:

The Act of March 1, 1901 (31 Stat. 861, 863), provided that lands allotted to citizens of the Five Civilized Tribes could not be sold or encumbered "before the expiration of five years from the date of the ratification of this agreement, except with the approval of the Secretary of the Interior."

This Act of Congress was superseded by Section 16 of the Supplemental Creek Agreement (Act of June 30, 1902, 32 Stat. 500, 503) which provided:

"Lands allotted to citizens shall not in any manner whatever or at any time be incumbered, taken or sold to secure or satisfy any debt or obligation nor be alienated by the allottee or his heirs before the expiration of five years from the date of the approval of this supplemental agreement, except with the approval of the Secretary of the Interior. * * * Any agreement or conveyance of any kind or character violative of any of the provisions of this paragraph shall be absolutely

void and not susceptible of ratification in any manner, and no rule of estoppel shall ever prevent the assertion of its invalidity."

Under Section 17 of the same agreement, allottees were given a limited right to make short-term leases for non-mineral purposes, but leases for longer terms and leases for mineral purposes might be made only with the approval of the Secretary of the Interior (32 Stat. 504).

By Act of April 21, 1904 (33 Stat. 189, 204), it was provided:

"And all the restrictions upon the alienation of lands of all allottees of either of the Five Civilized Tribes of Indians who are not of Indian blood, except minors, are, except as to homesteads, hereby removed, and all restrictions upon the alienation of all other allottees of said tribes, except minors, and except as to homesteads, may, with the approval of the Secretary of the Interior, be removed under such rules and regulations as the Secretary of the Interior may prescribe, * * *."

Before the expiration of the five years specified in the above-quoted provisions of the Creek Agreements, Congress passed the Act of April 26, 1906 (34 Stat. 137). Section 19 of that Act provided (34 Stat. 144):

"That no full-blood Indian of the Choctaw, Chickasaw, Cherokee, Creek or Seminole tribes shall have power to alienate, sell, dispose of, or incumber in any manner any of the lands allotted to him for a period of twenty-five years from and after the passage and approval of this act, unless such restriction shall, prior to the expiration of said period, be removed by Act of Congress."

Section 22 of the Act of April 26, 1906, *supra*, provided that:

"All the conveyances made under this provision by heirs who are full-blood Indians are to be subject to the approval of the Secretary of the Interior under such rules and regulations as he may prescribe."

Section 23 of the Act of April 26, 1906, *supra*, provided:

"Every person of lawful age and sound mind may by last will and testament devise and bequeath all of his estate, real and personal, and all interest therein; Provided, that no will of a full blood Indian devising real estate shall be valid, if such last will and testament disinherits the parent, wife, spouse, or children of such full blood Indian, unless acknowledged before and approved by a judge of the United States court for the Indian Territory, or a United States Commissioner."

Next came the Act of May 27, 1908 (35 Stat. 312), which provided that all lands belonging to intermarried whites, freedmen, and Indians of less than half blood were free from restrictions, and further provided that the homestead of Indian allottees of half blood or more were restricted until April 26, 1931, with the further proviso that the Secretary of the Interior would have the right to remove the restrictions in whole or in part "under such rules and regulations concerning terms of sale and disposal of the proceeds for the benefit of the respective Indians as he may prescribe."

In Section 2 of said Act it was provided:

"that leases of restricted lands for oil, gas or other mining purposes, leases of restricted homesteads for

more than one year and leases of restricted lands for periods of more than five years, may be made with the approval of the Secretary of the Interior, under rules and regulations provided by the Secretary of the Interior, and not otherwise: * * *.

"Sec. 9. That the death of any allottee of the Five Civilized Tribes shall operate to remove all restrictions upon the alienation of said allottee's land: *Provided, That no conveyance of any interest of any full-blood Indian heir in such land shall be valid unless approved by the court having jurisdiction of the settlement of the estate of said deceased allottee.*"

It will thus be seen that under the proviso of Section 9 that a conveyance of any interest of any fullblood Indian heir was void unless the same was approved by the County Court having jurisdiction of the settlement of the estate of the allottee or testator. Nowhere will there be found any Act of Congress between the dates of 1902 and 1933 vesting power in the Secretary of the Interior to reimpose restrictions on land or royalties belonging to members of the Five Civilized Tribes.

The Act of Congress May 27, 1908 (35 Stat. 312), was first construed by the Supreme Court of the United States in the case of *Parker v. Richard*, 250 U. S. 235, 238, 30 Sup. Ct. 442, 63 L. Ed. 954. There the Court held:

"By the Act of 1908, which imposed the restrictions on alienation and contained the leasing provision, Congress further declared, in § 9, 'that the death of any allottee * * * shall operate to remove all restrictions upon the alienation of [the] allottee's land: *Provided, That no conveyance of any interest of any full-blood Indian heir in such land shall be valid unless approved*

by the court having jurisdiction of the settlement of the estate of said deceased allottee.' In the absence of the proviso it would be very plain that, on the death of the allottee, all restrictions on the alienation of the land allotted to him were removed. But the proviso is there and cannot be disregarded. It obviously limits and restrains what precedes it. In exact words it puts full-blood Indian heirs in a distinct and excepted class and forbids any conveyance of any interest of such an heir in such land unless it be approved by the court named. In other words, as to that class of heirs the restrictions are not removed but merely relaxed or qualified to the extent of sanctioning such conveyances as receive the court's approval. Conveyances without its approval fall within the ban of the restrictions.
* * *

Further in the opinion the Court held:

"Under the Act of 1908, as already shown, leases of 'restricted lands' for oil and gas mining may be made with the approval of the Secretary of the Interior, under regulations prescribed by him, 'and not otherwise.' The present lease was made and approved under that provision. The land was then restricted and the restrictions have not since been removed. * * *

This opinion has not been changed, reversed, or modified in any respect until the opinion of the Circuit Court of Appeals in *Chisholm v. House*, 160 Fed. (2d) 632.

In *Chisholm v. House*, it was held [160 Fed. (2d) 647], that the 1926 Act did not reimpose restrictions previously promulgated by the Secretary's regulations and by him previously removed, and that the Act "dealt solely with restrictions against alienation. It in no sense impinged

on the right to receive payment of royalties under oil and gas leases. The restrictions with respect to the payment of such royalties, under the regulations promulgated by the Secretary of the Interior, had been removed by him, and could only be reimposed by action taken by him."

It is plain that by this holding the Circuit Court of Appeals has said that lands once freed from restrictions could be restricted only by action of the Secretary of the Interior. This is the first time in history that any court in interpreting the Acts of Congress relating to members of the Five Civilized Tribes, has held that the Secretary of the Interior could reimpose restrictions on land once freed from the same.

Congress Is the Only Authority Having Power to Reimpose Restrictions On Property Once Freed Therefrom.

The courts have repeatedly held that there is no limitation upon the authority of Congress to restrict Indian lands. Congressional authority here is plenary, *Taylor v. Tayrien* (C. C. A. 10th, 1921), 51 Fed. (2d) 884, 887; *Holmes v. U. S.* (C. C. A. 10th, 1931), 53 Fed. (2d) 960, Syllabus 1:

"Congress has plenary power in matter of continuance, removal, or qualification of restrictions on Indian lands after death of allottee."

Hickey v. U. S. (C. C. A. 10th, 1933), 64 Fed. (2d) 628, Syllabus 1:

"Congress has right to reimpose restrictions on Indian property once freed therefrom [Act June 28, 1906, § 4 (34 Stat. 544); Act March 3, 1921, § 4 (41 Stat. 1250); Act Feb. 27, 1925, § 1 (25 USCA § 331 note)]."

Also, *Brader v. James*, 246 U. S. 88, 62 L. Ed. 591, and *McCurdy v. U. S.*, 246 U. S. 263, 62 L. Ed. 706.

In the case of *Brader v. James*, *supra*, in the body of the opinion the Court stated:

"While the tribal relationship existed, the National guardianship continued, and included authority to make limitations upon the rights which such Indians might exercise in respect to such lands as are here involved. This authority would not terminate with the expiration of the limitation upon the rights to dispose of allotted lands; the right and duty of Congress to safeguard the rights of Indians still continued."

And in the case of *McCurdy v. U. S.*, *supra*, the Court held:

"While an Indian is still a ward of the Nation, there is power in Congress even to reimpose restrictions on property already freed; *Brader v. James*, decided this day (246 U. S. 88 ante 59) 38 Sup. Ct. Rep. 285;"

**The Qualified Restrictions of the Act of April 12, 1926, Sec. 1,
Attach Upon Payment of Oil Royalties From Restricted
Land to the Same Extent As Upon the Land Itself.**

Section 1 of the Act of April 12, 1926, amended Section 9 of the Act of May 27, 1908, and provides:

"The death of any allottee of the Five Civilized Tribes shall operate to remove all restrictions upon the alienation of said allottee's land; Provided, That hereafter no conveyance by any full-blood Indian of the Five Civilized Tribes of any interest in lands restricted by Section 1 of this Act acquired by inheritance or devise from an allottee of such lands shall be valid

unless approved by the county court having jurisdiction of the settlement of the estate of the deceased allottee or testator * * *."

While there are thus two Federal agencies for exercising the power of removal of restrictions, the fields of authority of these respective agencies are entirely separate, distinct and mutually exclusive; that is, where Congress has designated the Secretary of the Interior as the agency for removing restrictions, approval by the county court of an alienation is wholly ineffectual, *Holmes v. United States* (C. C. A. 10th, 1931), 53 Fed. (2d) 960, 963; and where the Congressional authority for removing restrictions is a county court, and such court has approved an alienation, not only is approval by the Secretary unnecessary, *United States v. Gypsy Oil Co.* (C. C. A. 8th, 1925), 10 Fed. (2d) 487, 492, but the Secretary may not prevent such alienation by his disapproval, *United States ex rel. Warren v. Ickes* (App. D. C., 1934), 73 Fed. (2d) 844, 848.

Other instances are numerous where the qualified restrictions imposed by the Act of April 12, 1926, have been held removable only by a county court, in respect to conveyance by a fullblood heir and by a fullblood devisee.

Not only is the protective power of Congress sufficient, but it is plain that Congress provided such protection for royalty payments after the 1926 Act. The words of the Act extend its protective scope to "any interest in lands." The wording must necessarily include any alienation of an interest less than the fee, including the daily severance from the land of oil and gas. In *Tiger v. Sellers* (C. C. A. 10th, 1944), 145 Fed. (2d) 920, 922, the interest

held subject to qualified restrictions was an assignment of future rents which was said to be an incorporeal hereditament. Oil royalty is likewise an incorporeal hereditament, *Burns v. Bastien*, 174 Okla. 40, 50 Pac. (2d) 377; *Dabney Johnston Oil Corp. v. Walden*, 4 Cal. (2d) 637, 52 Pac. (2d) 237.

In *United States ex rel. Warren v. Ickes* (App. D. C., 1934), 73 Fed. (2d) 844, there were fullblood heirs, but one of them had a special estate under the second proviso of Section 9 of the Act of May 27, 1908, because he was born after March 4, 1906, and therefore the Secretary retained supervision over the royalty income. When the special estate terminated by reason of death of that heir, the Court held that royalty funds in the Secretary's hands were no longer subject to the Secretary's control, and could be alienated by the other fullblood heirs, but that such alienation required county court approval because the qualified restrictions attached. The Court said [73 Fed. (2d) 847] that "The royalties are to be treated as composing part of the restricted homestead estate * * *" and held that the status of the royalty funds was the same as the land in respect of restrictions, termination of Secretarial control and the attaching of qualified restrictions.

In *United States v. Noble*, 237 U. S. 74, 80, 35 Sup. Ct. 532, 59 L. Ed. 844, the Court declared:

"The rents and royalties were profit issuing out of the land. When they accrued, they became personal property; but rents and royalties to accrue were a part of the estate remaining in the lessor,"

and held that congressional authorization given a restricted Indian to lease his land did not permit him to assign future royalties.

The Conveyance of December 19, 1929.

If an assignment of future royalties is forbidden, then clearly the trust instrument of December 19, 1929 (R. 39), is such a conveyance as to require county court approval. The instrument purports to be a mere substitution of a co-trustee, and the trial court so considered it (R. 128, Conclusion 5), but this is a wholly superficial view, formed merely from the appearances of things rather than from any regard for realities. In this instrument Nancy purported to authorize the resigning trustee, Hill Moore, to convey all of the trust corpus to his successor, D. W. Johnston, and Moore executed such a deed (R. 289). The oil company demanded and received a transfer order (R. 248) reflecting such change of title, just as it would on any other change of title. In *First National Bank v. Ickes* (App. D. C., 1945), 154 Fed. (2d) 851, 853, the Court in a comparable situation said:

"It contends that since the devise was to a non-Indian trustee, the Act does not apply. We think that the District Court was correct in its ruling upon that contention. In the first place, the Act restricts the alienation of 'any interest' in lands by full-blood Indians of the Five Civilized Tribes. Clearly, the beneficiaries had interests, and they were property interests. *Merchants' Loan & Trust Co. v. Patterson* (1923), 308 Ill. 519, 139 N. E. 912; *Illinois Nat. Bank of Springfield v. Gwinn* (1945), 390 Ill. 345, 61 N. E. (2d) 249, 159 A. L. R. 468; *Jones v. Jones* (1942), 344 Pa. 310, 25 Atl. (2d) 327, and cases there cited: Restatement,

Trusts, Sec. 130. In the second place, the statute was enacted by Congress for the protection of the Indians, and its terms are broad and non-technical. It would require clear language to compel us to hold that its provisions can be evaded by the simple expedient of interposing a non-Indian trustee to hold the legal title."

If the 1926 Act, *supra*, is construed to restrict alienation by the Indian heir or devisee, but not his "right to receive oil royalties" then the whole public policy is thwarted and congressional intent nullified. The Indian's sand-bur patches and red clay gullies are safeguarded to him; the underlying oil and gas become free to the first taker.

It is impossible that Congress intended any such result by the 1926 Act. When Congress there said that county court approval was required of the conveyance of "any interest in land," Congress plainly meant to include the day-by-day severance of oil and gas.

In *United States v. Thurston County*, 144 Fed. 287, it was held that the proceeds of restricted land were subject to the same restrictions as the land, and in *National Bank of Commerce v. Anderson*, 147 Fed. 87, it was held that the restrictions applied to the proceeds of timber cut from restricted land as well as to the land itself.

It was next held that land purchased with the proceeds of sale of restricted land was likewise subject to restriction, *Sunderland v. United States*, 266 U. S. 226, citing with approval *United States v. Law*, 250 Fed. 218, and *United States v. Thurston County* and *National Bank of Commerce v. Anderson*, *supra*.

That was soon followed by holding that land purchased with accumulated royalties of an oil and gas lease of restricted land was subject to restriction where the purchase had been permitted on condition that the deed contain a clause restricting alienation without the approval of the Secretary [*United States v. Brown*, 8 Fed. (2d) 564]. In that case, the Court (8 C. C. A.) expressly rejected the contention that there was a difference between land and royalties and held that both were impressed with the same trust (page 567).

In *Carpenter v. Shaw*, 280 U. S. 363, a tax on royalty interest was held to be prohibited by a provision which exempted allotted lands.

In *United States v. Moore*, 284 Fed. 86, an assignment of royalties was held void as in violation of restriction against alienation of the land, and a recovery of accrued royalties was sustained. In that case the Court said:

“[The Government’s] interest is not pecuniary, but governmental. *Heckman v. U. S.*, 224 U. S. 413, 32 S. Ct. 424, 56 L. Ed. 820. So it is with respect to this allotment. On principle, the action is not essentially different from one brought to recover the land itself. The authority to sue necessarily arose from the law, on the ground that the royalties were illegally obtained and there was no other remedy available. It is sustained on like reason as in the case of *United States v. Gray*, 201 Fed. 291, 119 C. C. A. 529, decided by this court where the action was for the recovery of damages for breach of a lease made by the allottee.”

In *United States ex rel. Warren v. Ickes*, 73 Fed. (2d) 844, the Court held that the qualified restrictions of the

1926 Act attach, not only upon the land, but upon royalty payments as well, and that the general restrictions arising out of regulations promulgated by the Secretary, had lapsed completely. The Court there said:

"The royalties are to be treated as composing a part of the restricted homestead estate; hence the removal of the restrictions from the homestead carries with it the full release of the funds accrued from oil and gas royalties. In the case of *Parker v. Riley*, 250 U. S. 66, 70, 39 S. Ct. 405, 406, 63 L. Ed. 847, the court, considering a lease and the rights acquired under it where the special estate of a minor was involved, as in the instant case, said: 'The oil and gas lease was to run for 10 years and as much longer as oil or gas was found in paying quantity. * * * The oil and gas were to be extracted and taken by the lessee, and for this royalties in money were to be paid. These minerals were part of the homestead, and the lease was to operate as a sale of them as and when they were extracted. In that sense the heirs were exchanging a part of the homestead for the money paid as royalties, but no heir was surrendering any right to the others. Thus the rights of all in the royalties were the same as in the homestead. Nothing in the Act of May 27, 1908, makes to the contrary.'

"With the removal of the restrictions, the land, together with the accumulated oil and gas royalties in the hands of the Secretary, became part of the unrestricted estate, and supervision over those funds ceased. On removal of the restrictions the owner of the land and the funds was at full liberty to use, dispose of, and contract with relation to them in his or her individual capacity, without reference to approval or disapproval of the Secretary of the Interior, subject only to the approval of the court of competent juris-

diction, in this instance the county court of Hughes County, Okla.”

Quoting from *Chisholm v. House*, *supra*, the court below stated that the right to receive future royalties had been effectively conveyed by the Indian devisee prior to the adoption of the 1926 Act. In this view the court wholly ignores the effect of the subsequent instruments executed by petitioner after the adoption of the 1926 Act. On December 19, 1929, the defendant, by virtue of the terms of the lease and transfer orders and division orders which had been previously executed, was under obligation to pay said royalties to Washington Grayson and Hill Moore, the then trustees. On December 19, 1929, plaintiff had a property interest in this land and the provisions of the Act of Congress April 12, 1926, *supra*, extended to that property interest. In *First National Bank v. Ickes*, 154 Fed. (2d) 851, 853, the Court said:

“It contends that since the devise was to a non-Indian trustee, the Act does not apply. We think that the District Court was correct in its ruling upon that contention. In the first place, the Act restricts the alienation of ‘any interest’ in lands by full-blood Indians of the Five Civilized Tribes. Clearly, the beneficiaries had interests, and they were property interests. *Merchants’ Loan & Trust Co. v. Patterson* (1923), 308 Ill. 519, 139 N. E. 912; *Illinois Nat. Bank of Springfield v. Gwinn* (1945), 390 Ill. 345, 61 N. E. (2d) 249, 159 A. L. R. 468; *Jones v. Jones* (1942), 344 Pa. 310, 25 Atl. (2d) 327, * * *

On December 19, 1929, plaintiff executed an instrument terminating the liability and rights of Hill Moore as a trustee (Exhs. 16 and 17, R. 289) and purported to convey to Washington Grayson and D. W. Johnston, trus-

tees, her interest in said property including the two-fifths devised interest in the Linda Yarhola allotment, with the right vested in said trustees to receive payment of future royalties. This instrument was a grant by the plaintiff of an interest in property. But it was not approved by the County Court of Okmulgee County, the Court having jurisdiction of the settlement of the estate of the allottee.

That future royalties constitute an interest in the land and come within the scope of the statute restricting against alienation has been definitely settled by the Supreme Court in *United States v. Noble*, *supra*, and *United States v. Moore*, 284 Fed. (2d) 86, and *Tiger v. Sellers*, 145 Fed. (2d) 920.

The Conveyance of December 17, 1937

On December 15, 1937, the then trustees, D. W. Johnston and Washington Grayson, quit-claimed said property back to Nancy Bradburn (Exh. 29, R. 309) and on December 17, 1937, Nancy executed a deed or conveyance vesting title in said two-fifths devised interest in Roy Bradburn (Exh. 23, R. 295). Defendant examined the title, concluded that the instrument of conveyance had effectively vested title in Roy Bradburn to said property and prepared and forwarded to all of said parties transfer orders and division orders to be executed by said parties designating the transfer and the interest acquired by Roy Bradburn (Exh. 26, R. 303 and Exh. 27, R. 306). None of said instruments or conveyances were approved by the County Court of Oklahoma having jurisdiction of the settlement of the estate of Linda Yarhola, the allottee.

Like the instrument of December 19, 1929, the conveyance of December 17, 1937, was accepted by the defendant as a conveyance of plaintiff's interest in the lands as well as the oil and gas royalties. However, defendant did not pay to the grantee named in the conveyance of December 17, 1937, until such time as plaintiff had executed transfer orders and division order setting up the respective interest of the parties in the mineral grant.

Unquestionably these instruments were conveyances of "an interest in lands" and said instruments not having been approved by the County Court in Oklahoma having jurisdiction of the administration and settlement of the estate of the deceased allottee the same were void.

In the case of *United States v. Noble, supra*, this Court was considering the legal effect of an instrument executed by a restricted Quapaw Indian wherein the allottee had the right to execute a valid oil and gas mineral lease on his property without the approval of the Secretary of the Interior, but could not transfer or convey his land without the approval of the Secretary of the Interior or first having obtained a removal of restrictions.

In an action to recover the rents and royalties transferred by the allottee without the approval of the Secretary of the Interior this Court said:

"It necessarily follows that the allottee in the present case, having no power to convey his estate in the land, could not pass title to that part of it which consisted of the rents and royalties."

And in the case of *United States v. Moore, supra*:

"(3) It is insisted that the payments made to the defendant were accrued royalties, and hence of per-

sonal property of the allottee, and within her control. That this contention is unavailing was made clear in the *Noble* case. The claim to the royalties was wholly derived from the illegal assignment, and was dependent upon it, and therefore the subsequent appropriation of the funds could not be justified. Furthermore, the wisdom of the restriction is well illustrated by the improvidence of the allottee in contracting upon an inadequate consideration for the transfer of the royalties. In our view, a recovery in this case cannot be defeated by the fact that the payments were made to the defendant after the royalties accrued."

What the petitioner is asking for in this case is the recovery of the royalties paid to the so-called trustees under an illegal assignment or a void transfer.

The various instruments of conveyances executed by plaintiff, a fullblood Creek Indian, member of the Five Civilized Tribes, transferring her two-fifths devised interest in the allotment of Linda Yarhola, a fullblood Creek allottee, subsequent to April 12, 1926, not having been approved by the County Court having jurisdiction of the settlement of the estate of the deceased allottee, was ineffectual to vest in the grantee the right to collect the rents and royalties from said restricted allotment. The defendant is charged with notice of the passage of the Acts of Congress relating to petitioner and the members of her tribe, *Heckman v. United States*, 32 Sup. Ct. 424, 224 U. S. 413, 56 L. Ed. 820; therefore, defendant had legal knowledge of the fact that said rents and royalties were restricted.

The decision below is plainly contrary to:

(a) The will of Congress expressed in the Act of May 27, 1908 (35 Stat. 312); as amended by Section 1 of the Act of Congress, April 12, 1926 (44 Stat. 239).

(b) Decisions of this Court in *United States v. Noble*, 237 U. S. 74, 80, 35 Sup. Ct. 532, 59 L. Ed. 844; *Parker v. Richard*, 250 U. S. 235, 238, 30 Sup. Ct. 442, 63 L. Ed. 954; *Brader v. James*, 246 U. S. 88, 38 Sup. Ct. 285, 62 L. Ed. 591; and *Stewart v. Keyes*, 295 U. S. 403, 55 Sup. Ct. 807, 79 L. Ed. 1507.

(c) Decisions of the Tenth Circuit Court of Appeals in *Holmes v. United States* (C. C. A. 10th, 1931), 53 Fed. (2d) 960, 963; *Grisso v. United States* (C. C. A. 10th, 1943), 138 Fed. (2d) 996, 1000; and *Tiger v. Sellers* (C. C. A. 10th, 1944), 145 Fed. (2d) 920, 923.

(d) Decisions of the Eighth Circuit Court of Appeals in *Brown v. United States* (C. C. A. 8th, 1928), 27 Fed. (2d) 274, 277; *United States v. Gypsy Oil Co.* (C. C. A. 8th, 1925), 10 Fed. (2d) 487, 492; and *United States v. Moore* (C. C. A. 8th, 1922), 284 Fed. 86.

(e) Decisions of the Appellate Court for the District of Columbia in *United States ex rel. Warren v. Ickes* (App. D. C. 1934), 73 Fed. (2d) 844; and *First National Bank v. Ickes* (App. D. C. 1945), 154 Fed. (2d) 851.

The decision below should, therefore, be reviewed here and reversed. All of which is respectfully submitted.

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